

ITEM: 10

SUBJECT: Administrative Civil Liability (ACL) Complaint No. R5-2005-05-01, Hilmar Cheese Company, Inc. and its wholly owned subsidiary, Hilmar Whey Protein, Inc, Merced County

BOARD ACTION: *Consideration of a Proposed Order ratifying a settlement agreement regarding the ACL Complaint.*

BACKGROUND: Hilmar Cheese Company, Inc. and its wholly owned subsidiary, Hilmar Whey Protein, Inc., (hereafter “Hilmar”) are privately held California corporations that own and operate a cheese processing plant (hereafter “Plant”) about one-half mile north of the unincorporated community of Hilmar. Hilmar discharges cheese processing wastewater from the cheese pit and the lactose pit to the “Primary Lands,” adjacent to the Plant. The discharge is regulated by Waste Discharge Requirements (WDRs) Order No. 97-206 and Cleanup and Abatement Order No. 2004-0722 (hereafter “CAO”). Since March 2001, Hilmar has also provided treated wastewater to other persons for irrigation of “Secondary Lands” near the Plant.

On 26 January 2005, the Executive Officer for the California Regional Water Quality Control Board, Central Valley Region issued Administrative Civil Liability (ACL) Complaint No. R5-2005-0501 to Hilmar Cheese Company, Inc. and its wholly owned subsidiary, Hilmar Whey Protein, Inc. The ACL Complaint alleges that (1) Hilmar’s self-monitoring reports document 1,039 days of violation of the discharge effluent limit of 900 micromhos per centimeter ( $\mu\text{mhos/cm}$ ) for EC prescribed by WDRs Order No. 97-206 for discharges to Primary Lands; (2) Hilmar’s self monitoring reports document that on those 1,039 days, Hilmar discharged 821,000,000 gallons of wastewater to the Primary Lands; and (3) on those 1,039 days, Hilmar discharged waste or caused or permitted waste to be deposited where it was discharged into waters of the state. The ACL Complaint proposes that Hilmar pay a liability of \$4,000,000 (four million dollars).

Hilmar contends that 900  $\mu\text{mhos/cm}$  is an unprecedented standard; that Hilmar is required to treat its wastewater to a quality better than the drinking water that community water providers actually supply to the consuming public at the tap; that its wastewater is not toxic; and that for these and other reasons, the proposed administrative civil liability is excessive and should be eliminated or significantly reduced.

To avoid the expense and uncertainty of litigation, the Prosecution Staff of the Regional Board and Hilmar reached a settlement in October 2005, but before the settlement agreement became effective it had to be approved and accepted by the Regional Board. After considering the merits of the settlement agreement during the November 2005 Board meeting, the Board members directed the parties to reopen negotiations to address concerns expressed by the Regional Board members and members of the public. Hilmar and the Board's prosecution team agreed to a revised version of the settlement agreement on 10 February 2006, (See Attachment A which contains a redline and strikeout version, allowing comparison with the old settlement agreement and a clean version of the revised agreement) which the parties believe addresses many of those concerns.

Issues raised during the November 2005 Board meeting included, but were not limited to: 1) the scope and purpose of the supplemental environmental project, the lack of apparent objectivity of the study team, the lack of Board control over the design and implementation of the SEP, concerns with the stakeholder and peer review process; 2) the nature and scope of the releases provided both by and to the Board in the settlement agreement (including the continuation of Hilmar's Basin Plan lawsuit); and 3) the discharge limits during the interim operating period, and the length of time these interim limits would apply. The primary revisions to the settlement agreement include: 1) Clarification of the scope of the Regional Board's release; 2) modification to the duration of the release and the interim operating period; and 3) modification to the supplemental environmental project study outline. Again, before the revised settlement agreement becomes effective it must be ratified by the Regional Board.

As noted below, the 10 February 2006 Settlement Agreement and related documents have been posted on the Regional Board's website and are available to be downloaded by the public for review and will also be provided in paper copy to those persons without internet access requesting agenda materials. The Regional Board has been asked to approve and accept the proposed 10 February 2006 settlement agreement, which among other things would resolve the issues set out in the complaint.

This summary was prepared by adjudicatory staff, and is not intended to represent the complete agreement. The 10 February 2006 Settlement Agreement itself contains all of the terms and includes the following components:

1. No admission of liability by Hilmar.
2. A one-time payment by Hilmar of \$1,850,000 to the State

Water Resources Control Board, Waste Discharge Permit Fund, and \$150,000 to the Attorney General's office to defray its costs.

3. A one-time payment by Hilmar of \$1,000,000 to fund a Supplemental Environmental Project. This Supplemental Environmental Project consists of a study of the management of salinity in wastewater in the California food processing industry (see additional details below).
4. The Regional Board "shall and do release and covenant not to sue or take administrative action against Hilmar,..." et al for civil liability with respect to Matters Covered by the settlement agreement (with enumerated exceptions). The release and covenant not to sue applies to all "covered matters", which include: a.) all past violations of Hilmar's current Waste Discharge Requirements, Order No. 97-206, the Water Code, or the federal Clean Water Act that staff had knowledge of as of the date of the settlement ; and b.) any continuation or recurrence of violations of specific enumerated provisions in the Waste Discharge Requirements, Order No. 97-206 after the date of the Settlement Agreement until the date that the Board adopts updated Waste Discharge Requirements.
5. A schedule requiring Hilmar to prepare monthly progress reports, and requiring Hilmar to submit a revised Report of Waste Discharge by October 31, 2006.
6. Interim Operating Limits pertaining to maximum daily discharge rates and concentrations with which Hilmar will comply while updated and revised Waste Discharge Requirements are being prepared and adopted by the Board.
7. If Hilmar violates the Interim requirements, the release is invalidated for those periods of time, and the Board may take enforcement action including civil liability. The covenant not to sue and the release no longer apply after the Waste Discharge Requirements are revised and adopted by the Regional Board.
8. Regional Board may seek injunctive relief, seek civil liability, or issue administrative Orders for future violations of the Cleanup and Abatement Order No. R5-2004-0722.
9. Hilmar retains its claim and right to litigate the issues regarding the Basin Plan, Merced Superior Court No. 148824 or any litigation that maybe filed in relation to the State Board's dismissal of Hilmar's Petition, State Board Order No. A-1717.
10. The objectives of the revised supplemental project in the 10 February 2006 settlement agreement are: 1) to describe the impacts to regional water quality from food processing

discharge wastewater; 2) identify both short- and long-term management options for the treatment, control and disposal of saline wastewater from the food processing industry; 3) measure the economic impacts of various salt management and disposal options to the regional economy of the Central Valley and other affected regions of the state; and 4) evaluate water quality control policies to improve water quality with respect to salt, and provide specific recommendations regarding the water quality policy changes and additional work necessary to successfully integrate the needs of the food processing industry into a salt management plan for the Central Valley.

The Regional Board will consider the 10 February 2006 Settlement Agreement, and it may consider whether to re-establish the procedural schedule and re-schedule the hearing on the ACL Complaint if the revised settlement is not accepted. This is not intended to be a hearing on the merits of the ACL Complaint. The Regional Board may:

1. Accept & ratify the proposed settlement;
2. Request minor modifications and if the Parties agree to those changes, accept the Settlement;
3. Disapprove the revised settlement with some direction or suggestions to prosecutorial staff; or
4. Disapprove the revised settlement and re-establish the procedural schedule and reschedule the hearing.

ISSUES:

- Should the Regional Board accept the proposed settlement? [Attached are the proposed Order, prepared by the adjudicatory team];
- Should it provide instructions to prosecution staff to revise the revised settlement? or
- Should it re-establish the procedural schedule and reschedule the hearing?

Mgmt. Review \_\_\_\_\_

Legal Review \_\_\_\_\_

**16/17 March 2006 Board Meeting**

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